

The TM Group, Inc. and Kimberly Grover. Case 07–
CA–052730

September 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On April 1, 2011, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. However, we do not rely on the judge's discussion of Judy Thomas' testimony as to the precise day she decided to discharge Grover.

The judge inadvertently stated that the Respondent's economic problems began by the end of December 2009, rather than 2008. The judge also inadvertently stated that Judy Thomas testified that, to reduce costs, the Respondent purchased a car Scott Thomas had been leasing; Judy actually testified that Scott had purchased the car. These inadvertent errors do not affect our decision.

² We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Kimberly Grover. We agree with the judge—essentially for the reasons he states—that the Acting General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that Grover's protected activity was a motivating factor in the decision to discharge her. Contrary to the judge's statement of the *Wright Line* standard, however, a "nexus" is not an element of the General Counsel's initial burden. See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011) ("The elements commonly required to support a finding of discriminatory motivation are [Sec. 7] activity by the employee, employer knowledge of that activity, and . . . animus [against such activity] by the employer.") We agree with the judge that the timing of Grover's discharge demonstrates animus, and we find that Judy Thomas' "upset" and "betrayed" reaction to revelations, whether true or false, concerning discussions Grover had with coworkers about working conditions also support a finding of animus against Grover's protected concerted activity.

We also agree with the judge that the Respondent has not met its rebuttal burden, under *Wright Line*, of showing that it would have discharged Grover even in the absence of her protected activity. In that regard, we note that the Respondent's assertion—that it discharged Grover solely for financial reasons—is contradicted by the email Judy Thomas sent to the Respondent's employees, stating that the decision to fire Grover was due to financial reasons "as well as the fact that she had reportedly shared some of her thoughts and concerns with members of our staff." Although the Respondent's financial difficulties may have been a legitimate reason for discharging Grover, neither the email—nor

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The TM Group, Inc., Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a), and re-letter the subsequent paragraphs accordingly.

"(a) Within 14 days from the date of this Order, offer Kimberly Grover full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

"(b) Make Kimberly Grover whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision."

2. Substitute the following for paragraph 2(d) (relettered 2(e)).

"(e) Within 14 days after service by the Region, post at its Farmington Hills, Michigan facility copies of the attached notice marked "Appendix."⁴ Copies of the notice,

any of the evidence credited by the judge—demonstrates that the Respondent would have discharged her absent her protected conduct. See *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989). In view of the Respondent's failure to sustain its rebuttal burden, we find it unnecessary to pass on the judge's additional finding that the Respondent's financial justification for the discharge was pretextual.

In agreeing that the Acting General Counsel satisfied his initial *Wright Line* burden, Member Hayes finds no need to rely on Thomas' reaction to the reports of alleged conversations Grover had with fellow employees. In addition, he would not rely on facts cited by the judge that are only relevant to his pretext finding, such as the Respondent's failure to inform Grover of her pending termination, the Respondent's statement in its email to employees that business is picking up, and the Respondent's failure to investigate Kountouriotis' allegations of Grover's improper behavior. Member Hayes also finds no need to rely on *Worldmark By Wyndham*, 356 NLRB 765 (2011), a case in which he dissented.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissent in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall also substitute a new notice to conform to the Order as modified.

In addition, we modify the judge's remedy to provide that Grover shall be made whole for her losses, if any, from August 24, 2009 to the date she receives a valid offer of reinstatement, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2009."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for concertedly complaining to management regarding wages, hours, and working conditions.

WE WILL NOT discourage you from talking to each other about wages, hours, and working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, offer Kimberly Grover full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kimberly Grover whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kimberly Grover, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

THE TM GROUP, INC.

Patricia A. Fedewa, Esq. and *Darlene Haas Awada Esq.*, for the General Counsel.

Simcha Shapiro, Esq., of Farmington Hills, Michigan, for the Respondent.

Kimberly Grover, Charging Party, Pro Se.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me on November 1 and 2, 2010, in Detroit, Michigan, pursuant to an original charge filed by Charging Party Kimberly Grover on February 5, 2010, against The TM Group, Inc. (the Respondent); on February 19, 2010, Grover filed an amended charge against the Respondent; and on March 17, 2010, Grover filed a second amended charge against the Respondent.

On September 21, 2010, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act). On October 1, 2010, the Respondent timely filed its answer to the complaint, essentially denying the commission of any unfair labor practices and asserting certain affirmative defenses.

At the hearing, the General Counsel proposed an amendment to the complaint as follows:

On about August 24, 2009, Respondent through its agent Judy Thomas, discouraged employees from talking to each other about wages, hours, and terms and conditions of employment.

Respondent engaged in the conduct described above to discourage employees from engaging in the activities described in paragraph six of the complaint and other protected concerted activities.

By the conduct described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in viola-

tion of Section 8(a)(1) of the Act.¹

It should be noted that the proposed amendment was the subject of a pretrial conference between me and the parties and the subject matter of the proposed amendment is closely related to the subject matter of the original complaint. Since the Respondent suffered no unfair surprise by the proposed amendment and, in fact, did not oppose the amendment and since the amendment was closely related to the allegations in the complaint, I allowed the amendment and evidence was presented pursuant thereto.

At the hearing, the Respondent was represented by counsel; the Charging Party appeared pro se. However, all parties were afforded a full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs² filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that at all material times it is a corporation with an office and facility at 34705 West Twelve Mile Road, Suite 371, Farmington Hills, Michigan, and has been engaged in the installation, support, and development of financial and business productivity of Microsoft software. The Respondent also admits that during calendar year 2009 in conducting its business operations, it derived gross revenues in excess of \$1 million and purchased and received at its Farmington Hills facility goods valued in excess of \$50,000 directly from points located outside the State of Michigan.

The Respondent admits, and I would find and conclude, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. BACKGROUND

The TM Group, as noted, sells accounting and business software and provides consulting services in support of the software.

The management of the Company consists of essentially four individuals: Judy Thomas, president and chief financial officer; John Scott Thomas (known as Scott, and Judy Thomas' spouse), chief executive officer; Mark Thomas, chief information officer, vice president (and Scott's brother); and Ken Jacobsen, head of marketing. These four persons conducted TM's business operations as its "management team" and met regularly to address the operations, personnel, and other related issues of the business. The Respondent admits that each member of its management team is either a supervisor and/or agent

¹ This amendment is contained in GC Exh. 6., par. 7 of the complaint was amended to include pars. 7(a) and (b); 7(b) incorporated the proposed amendment and was in turn incorporated by reference in pars. 8 and 9 of the complaint.

² Charging Party Grover did not file a brief; Grover was given full opportunity to testify and otherwise participate in the proceeding but elected to defer to the General Counsel's prosecution of the case.

within the meaning of Section 2(11) and/or (13) of the Act.³

During the times material to this litigation, the Respondent employed about 30 employees consisting of an administrative staff, consultants, and sales and marketing personnel. The administrative employees were at will and could be subject to termination at any time and without cause.

Kimberly Grover was hired by the Respondent on September 28, 2008, as an assistant controller whose duties included handling the Company's payroll, accounts payable, accounts receivable, collections, benefits administration, bank accounts reconciliation, daily banking, and working with the ledger; the assistant controller was a part of the Company's administrative staff.

At the time of her hiring, Grover was informed both in writing and verbally during the in-person interview with Judy and Mark Thomas that as an assistant controller she would be and was subject to the Company's confidentiality policies which applied not only to business competitors but also certain information about the Company's employees, to include bankruptcies, garnishments, and other strictly employee matters.⁴

Beginning sometime in 2008, but to a certainty by the end of December 2009, the Respondent experienced the first of its economic problems in the loss of a major client. Later in March of 2009, another major client reneged on its contract responsibilities to pay billings for work performed by the Respondent. The loss of these major clients caused a serious cash

³ Based on the credible testimony of record, I would find and conclude that Judy, Scott, and Mark Thomas, as well as Jacobsen, are supervisors and/or agents within the meaning of the Act. Jacobsen did not testify at the hearing.

⁴ See GC Exh. 3, a copy of the Respondent's offer letter to Grover dated September 23, 2008. This letter contains a section entitled "Confidential information" that states as follows at p. 2:

Confidential information. You will, during the course of service [with TM Group] come in contact [sic] with certain confidential information, including, but not limited to, customer lists and names, customers' records, files pertaining to customers and the specific needs and wants of customers, financial data and information pertaining to customers and the business of customers, special products developed by the Corporation to service the needs of customers, The TM Group's billing practices and procedures, special designs of The TM Group's products, as well as the methods used by The TM Group to manufacture its products, and other confidential information and/or trade secrets of The TM Group. The term "confidential information and trade secrets," as used in this paragraph shall be interpreted in its broadest possible context to include all confidential information, trade secrets and other information which you may learn, or which may be disclosed to you in connection with and through your employment with The TM Group. You agree not to disclose this information to third parties, nor to use the information for your benefit or for the benefit of any third party. You recognize and agree that all confidential information, business records, business files, and business documents are the sole and separate property of The TM Group, and shall not be removed, duplicated or used in any manner by you for your benefit or for the benefit of any third party.

Grover was told by Mark Thomas in her in-person interview that the Company also expected her to maintain the confidentiality of information about fellow employees and not to share such information with anyone other than the three persons—Judy, John Scott, and Mark Thomas.

flow problem for the Respondent necessitating an examination by the management team of areas of the Company's operations that could be subject to cost-cutting. Inasmuch as about 70 percent of the Company's operating costs were for labor or personnel, beginning around May and through June and July 2009, the Respondent considered several alternate plans to reduce personnel expenses (but also other expenses) to include layoffs, reduced hours, and outright termination of employees.

On July 16, 2009, the three principal owners—Judy, John Scott, and Mark Thomas, met with Grover and three other members of the administrative staff and informed each person that because of the Company's financial condition each would have to take 1 day (8 hours) off per week, resulting in a reduction of 16 hours in the bimonthly (80 hours) pay period. The administrative employees were told not to discuss their reduction in hours until management had the opportunity to inform the consultant and sales employees of the reduction. Grover and other administrative employees were upset and disturbed over the reduction in their hours.

On August 24, 2009, Grover was terminated by the Respondent. Also, on August 24, Judy Thomas sent the following email to all of TM's employees:

We have parted ways with Ms. Kim Grover as of today's date. We evaluated this both from the standpoint of fiscal savings as well as the fact that she had reportedly shared some of her thoughts and concerns with members of our staff, and in her position of confidentiality, that is not acceptable. I have and [sic] seen and talked with a great many of you; some had heard these rumors and some have not. The key factor is that they are rumors, and I have never been one to shy away from talking with anyone about issues on their minds. If anything is concerning you, please talk with a Management employee not each other. This rumor mill really needs to stop in its tracks; the dramatics need to cease. It's not good for employee morale and it's certainly not good to get out to clients and constituents.

Business *definitely* is picking up. The level of activity around new and existing opportunities is way up; we're in front of quite a few opportunities that could be very short term wins. Clients who had done nothing all summer (and spring for that matter) are calling and wanting to get started again. There are very positive signs. The one thing I would ask of all of you is to be patient with each other and with our Management team. There have been quite a few ups and downs this year, not only here but everywhere, and it's wearing on everyone's nerves, but please let's try to ratchet down the frustration level. If there is *anything* to report to you, the Management will report it. No one else is in our Management meetings, as it should be, so if you are listening to and hearing rumors, I would again emphasize that's all they are is rumors unless you hear something from Mark, Scott, me or Ken . . . period.

Let's try to remember that we are a team. If you don't have work, we have clients you can start calling. If you have too much work, try sharing with someone else on the team who may not have as full a schedule or maybe needs to learn something more than they know today.

We thank you for your work, your loyalty and your care of our clients. They all depend on you, as do we.⁵

By letter dated August 24, 2009, Grover emailed Judy and Mark Thomas and, *inter alia*, denied ever giving confidential information to anyone.⁶

A. *The General Counsel's Witnesses*

Kimberly Grover testified that she was hired on September 28, 2008, as assistant controller for TM, but later discovered that she was carried on the company books as a bookkeeper. Grover stated that her duties included handling practically anything involving accounting; e.g., accounts payable and receivable, payroll, bank reconciliation, as well as keeping the Company's general ledger. Grover noted that all payments she made on behalf of the Company were preauthorized by Judy, Mark, and Scott Thomas, the owners of the Company; she did not sign any checks.

Grover acknowledged signing the offer letter she was presented with at the time of her hire, noting that it was similar to other such letters she has filed in employee files and that the confidentiality language contained in her letter was typical of all such letters provided to new employees.

Grover recalled that at the time of her interview with Judy and Mark Thomas, she was told that there were three owners and she was free to discuss anything with them, but that any information deemed confidential was not to be shared with other employees. Grover stated that Judy and Mark were not specific in terms of what was confidential.

According to Grover, in her view Judy did not seem to be overly concerned about keeping the affairs of the Company confidential and she seemed in fact to be somewhat dismissive or unmindful of matters Grover felt should not have been disclosed to employees.

Grover recalled that within the first few months of her employment, she and Judy were working in the conference room discussing the Company's tax liabilities and money owed a vendor when Mark stepped in and suggested that they close the door for the sake of privacy. According to Grover, Judy dismissively said everybody knows about this, she was not worried about it.

Grover related how at times when she and Judy were discussing payments to vendors, Judy would tell her audibly through the office doorways whom to pay and whom not to pay. Grover also stated that on various occasions she would speak to Judy about tax or 401 payments in her office and Judy would address these matters in the presence of managers and employees who happened to be there. According to Grover, these types of informal discussions were fairly regular, occur

⁵ See GC Exh. 2. The underscored language in the email as set out above appeared in the original document.

⁶ See GC Exh. 4, a copy of Grover's letter in which she also requested pay stubs for calendar 2009, that she would require for an application for unemployment benefits, and Cobra (insurance information). Grover also asked the Company only to verify her employment there and not mention to any prospective employer that she was terminated from any breach of the confidentiality policy.

ring every week or every other week when items such as taxes and other payables were due.

Grover stated that she thought Judy's behavior somewhat odd because she would make these comments about the Company's affairs in areas where employees came and went—the conference room was near the kitchen—and could overhear any comments or discussions regarding finances of the Company.

Grover related that when she hired on, she believed the Company was doing well. However, Grover stated that once on board, she discovered fairly early on that the Company was not doing well financially and, in fact, was in financial difficulty during the entire time she was employed. Grover recalled that on her first day on the job, administrative employees Kim Keller and Lisa Woods informed her during a smoke break that the bills were not being paid, that the 401(k) contributions were not getting paid, and they were concerned about the Company then.

Grover stated that while she was employed, the Company's payables were 60–90 days past due; taxes were not paid, and things got progressively worse during 2009, what with unpaid vendors calling in and past due tax notices coming in the mail. Grover said that she believed that some employees knew or should have known about the Company's financial predicament; for instance, employee Shannon Erisman opened the mail and as receptionist answered the phones; also, the marketing director for the Company would on occasion ask her (Grover) when vendors who had been calling her could be paid. Grover also noted that she also would send to Judy, Mark, and Scott, Ken Jacobson, and Kim Keller daily bank sheets which showed cash received that day, what was paid, and a reconciliation of the accounts to determine cash flow.

In any case, Grover stated that in spite of the Company's financial issues around the first of 2009, management continued to hire new employees,⁷ some of whom commanded high salaries; expanded its leased office space; purchased furniture for the space; and purchased for the 2009 baseball season tickets for the Detroit Tigers Baseball Team. Grover also noted that the managers went out to lunch everyday and charged the expenses to the company credit card or bank account.

According to Grover, there also was the matter of Scott's regularly taking advances on his salary during these times of financial difficulty. Grover said that as part of her duty to reconcile the company checking account, she happened to learn of this, but Kim Keller also was aware of Scott's activities. According to Grover, Keller told her that she had a promissory note from Scott in her desk drawer reflecting a prior loan that both Judy and Scott had incurred and asked whether Scott had ever paid this loan.

Grover also stated that in addition to Keller, Shannon Erisman and the former controller later transferred to a consultant's job—Lynn Kozoro—expressed their concerns about Scott's advances when they saw him come in for more advances.

Grover said that the conversations about Scott with these employees usually took place in her office after the employees

observed Scott in her office. The employees would ask her whether Scott was asking for money. Grover said on other occasions, conversations about Scott took place during employee smoking breaks.

Grover stated that after a time the employees became aware that the Company had lost large clients, and as a result some consultants were sitting at home with no work; according to Grover, the employees were generally concerned about the welfare of the Company and the issue was “abuzz” all of the time.

Grover stated that on July 16, 2009, she along with other administrative staffers Kim Keller, Shannon Erisman, and Kathy McDonald were called to a meeting with Judy and Mark Thomas and Ken Jacobsen. According to Grover, Judy told them that in spite of the Company's attempts it was not doing well financially but that the Company did not want to lay off anyone. So, after much thought, Judy said that she had decided to reduce their hours, that each of the administrative workers would be required to take 1 day a week off during the biweekly pay period for a reduction of 16 hours per pay period. According to Grover, Judy also said that management would continue to find ways to cut expenses and realized that management could not expect the same production from them. According to Grover, Judy advised them that they were free to work out among ourselves what days we were going to take off and that management recognized that on a given day there may be only one of us at work but that management would be patient as the Company worked through the difficult times. Finally, according to Grover, Judy told them not to discuss the matter with any other employees. However, once we left the meeting, we were free to talk among ourselves, but not to anyone else because management did not want to upset the consultants.

Grover stated that she spoke up at the meeting, saying that it was her hope that management would look into other cost-cutting measures,⁸ and in response Judy asked her to make up a list of such measures and submit it to her.

Grover recalled that McDonald also spoke up and told Judy that she was busy all of the time and did not think she could do her job in a 4-day workweek.

Grover stated that she and Keller took the Friday after this meeting off and conversed further about the meeting on the following Monday. As it happened, Judy had emailed them complaining that they had both taken the previous Friday off, leaving the Company without someone to handle the banking duties, and that henceforth they would have to submit a schedule of the days each would be off. According to Grover, Keller raised another subject and told her that she had spoken to all of the consultants—her husband also was a consultant—who had called her over the weekend, upset and saying that the hours reduction plan was not the right decision in view of the Company's having hired two new consultants—Tammy Cowart and Jeff Majchurzek in particular—who were not working on any

⁷ Grover identified Shannon Erisman, receptionist, who was hired about a month after her; Marcel Chabot, a software designer; and Jeff Majchurzek and Tammy Cowart, consultants also hired after her.

⁸ Grover said that she told Judy then that certain amenities such as employer-provided sodas, candy, and coffee, and idle consultants could be cut to reduce expenses.

projects. In Grover's opinion, Keller was very upset—shocked—about having her hours cut.

As this conversation continued, Grover said that she and Keller reasoned that if they were to lose 1 day per week, they should not be available (for work duties) on those days; they should shut off their cell phones and not check the company emails. Grover said that she and Keller believed that management wanted the same amount of work from them and at the same time was paying them less. Grover said she told Keller that she, in fact, knew that she (Keller) continued to access her emails when on the off-day and ordered software. Grover said she advised Keller that they were not going to get their hours restored if she continued to do that. According to Grover, Keller agreed with her and said that if we were going to be off we should truly be off duty and not work.⁹

Grover recalled that Kathy McDonald¹⁰ was also very upset over the reduction in her hours because her husband was then out of work, and hers was the only income for her family. According to Grover, McDonald came to her and asked her if she had spoken to either of the Thomases about cutting other expenses. Grover also recalled that Shannon Erisman¹¹ was a single mother and told her that she needed to have full-time employment. Grover also related a time when Lisa Woods¹² came to her office—as did the others—and informed her that she was seriously considering a job offer with another company and asked her (Grover) whether her job was secure enough to stay with the Company. Grover said she told Woods that she believed that her position was secure because she had more work than most of the consultants, but that she had to decide for herself whether to stay.

Grover recalled an occasion when a consultant, Perry Kountouriotis,¹³ came to her office and closing the door related a conversation he had with Judy. Grover noted that Keller happened to be in the office at the time. According to Grover, Kountouriotis said that he was concerned about the direction of the Company and did not agree with the hours' reduction, especially since there were consultants that he knew were not working, but still on the payroll; Kountouriotis said he thought they should have been laid off before reducing the hours of other employees.

Also according to Grover, Kountouriotis asked her if there were other areas that could be cut, and had she spoken to Judy about reductions in other areas. Grover stated that she told him that while she (Grover) could make suggestions, Judy was the owner and the ultimate decision maker.

Then about a week after this discussion (around July 23),

⁹ Grover volunteered that in her opinion, Keller was always worried about her job security with the Company and believed that Erisman was hired to replace her. According to Grover, Keller would occasionally ask if she knew whether she was to be let go. Grover said that she told Keller to simply do her job and do it well. However, Keller's performance fell off and Grover said she told her she was going to be let go according to Judy, who was going to replace her with Erisman. Grover noted that Judy would say this when she argued with Keller.

¹⁰ McDonald did not testify at the hearing.

¹¹ Erisman did not testify at the hearing.

¹² Woods did not testify at the hearing.

¹³ Kountouriotis testified at the hearing; his given name is Periklis.

Grover said that Scott Thomas asked for an advance against his salary. Grover stated that this upset her and she then complained to him, telling him employees had just had their hours reduced, that she herself was making \$500 less per week and had to live on less and he could not even "make it" from paycheck to paycheck, that he was (unjustifiably) taking money out of the Company and, further, management had to seriously cut expenses. According to Grover, Scott said that he understood her concerns and that if she needed a loan, she could have one. Grover said that she told him she did not want a loan because she could not pay it back since she was making less money.

Grover said that she took that occasion to again state her concerns about management's leasing additional office space, paying more rent and utilities, and still buying sodas and candy for the employees while some employees were suffering. According to Grover, Scott told her that she would have to speak to Judy about those matters and the conversation ended.

Grover said that the employees wanted their hours restored and asked her whether she had spoken to Judy about saving money through other cost reductions. Grover believed she was consulted by them because they believed she as controller was in charge of the Company's finances. In any case, Grover said that she was concerned about Scott's advances¹⁴ and, since she was about to go on vacation, thought that it would be a good idea to give Mark the company checkbook. However, before going to Mark, Grover said that she conferred with Keller who concurred with her about Scott's advances and had observed an entry on the general ledger which removed Scott's loans. According to Grover, Keller said that she was fearful for her job were she (Keller) to speak with Mark.

Grover stated that she believed Mark had a right to know about Scott's actions and later told him that Scott was getting checks from her. According to Grover, Mark asked whether Scott was repaying the account and she told him he was not and, in fact, he was taking more than he could pay back. Grover said that Mark told her that he had looked into the accounting system but could not ascertain what was going on and thanked her for the information. Mark then asked her to prepare a spreadsheet of Scott's activity.

Grover said that she told Mark that Judy had made entries in the books that wrote off Scott's loans and this was of concern to her because the Company was behind on its bank loan, and she feared an audit that would disclose the write-off of Scott's advances to office and entertainment expenses that would not be approved by the bank. Grover said that she told Mark that there were no receipts for these supposed expenses and this really worried her, but that she thought that she would be fired over this matter. According to Grover, Mark told her not to worry, that regrettably Judy and Scott were codependent on one

¹⁴ Grover also stated that Scott was not current with outstanding loans with the Company and was taking more than he could repay. Grover identified R. Exh. 1, a copy of an email she had sent to Judy on July 1, 2009, dealing with Scott's pay and showing that he had more money advanced than paid back.

another and that Scott had a gambling problem and frequented go-go dance venues.¹⁵

Grover stated that it was her view that Mark was trying to explain why things were what they were at the Company, but that she should not worry because he would take care of the problem.

Grover stated that in this discussion with Mark, she also raised the employees' concerns about the reduction of hours and that the Company's spending was not consistent with its financial problems, and that the management lunches were a really "sticking point" with many employees. However, according to Grover, Mark defended the lunches, saying that they provided an opportunity for management to get out of the office and discuss various issues related to the business. Mark stated that the lunches would not be discontinued.

Grover said that she also raised various issues of concern to her such as consultants being carried on the payroll but not working on projects, the untimely payment of payroll taxes, an impending bank audit, and untimely payment of the employees' 401(k) contributions, all of which she believed required cutting of expenses to be resolved.

Grover recalled that she went on vacation on August 15, and this conversation with Mark occurred right before she left work; she was scheduled to return from vacation on August 24.

Directing herself to August 24, Grover said that she reported for work at about 8–8:30 a.m., her usual arrival time. Judy was already there as was Mark, and she met with them in the conference room where Judy announced that she was to be let go. According to Grover, Judy said [paraphrased]:

You would not believe all the things I have heard about you this past week while you were gone . . . you have been discussing wages with other employees, discussing the condition of the company. You have told employees our company is not going to last until the end of the year, that we are not paying our bills. You have just about ruined my company.

According to Grover, Judy went on to say that she could not have her working there and causing hysteria with all the employees.

Grover said that she responded, telling Judy that she (Grover) did not have to tell the employees about what was going on—they already knew (about the Company's financial problems) when she was first hired, what with vendors calling and all.

According to Grover, Judy then accused her of discussing with the marketing director, Andrew Dolan, that vendors were not getting paid. Grover responded that Dolan herself was contracting with the vendors who were calling her for payment, and Dolan would in turn come to Grover asking when they would be paid. Grover said that she only told Dolan that she would speak to her (Judy) about the matter. Grover said that she told Judy that the tax notices came in the mail and Keller, McDonald, or Erisman opened the mail, that everyone knew that the Company had hired two new employees and one—Majchurzek—came from a company known to be a high compensation employer and the expenses of the other—Tammy

Cowart—were excessive; the employees knew about this and came to her to discuss the matter; Grover said that she never divulged any financial information about the two to the employees.

According to Grover, Judy then accused her of telling employees that the Company was paying her mortgage. Grover said she flatly denied this, saying that first it was not true, and there was no reason to say that in any case because it was not true. Grover said at that point she turned to Mark and reproachfully told him that she knew that this would happen if she told him about Scott's advances.

According to Grover, Judy then denied that this was the reason she was being let go, that she had made up her mind to fire her before she went on vacation but did not have time to do so.

Grover said the meeting ended with Judy expressing sorrow over having to let her go because of a pending (bank) audit, and telling her the Company would not oppose her unemployment application. Grover said that Judy then walked her back to her office where her personal items had already been packed up and she left the premises.

Grover acknowledged sending an email to Judy and Mark on August 14, and discussed various matters associated with her mustering out and, more importantly, strongly denying divulging any matters requiring confidential treatment.

Grover noted at the hearing that Judy never spoke to her about not being able to afford to keep her on, and at the termination meeting, only mentioned her having breached the confidentiality policy as grounds for discharging her.¹⁶

Periklis Kountouriotis testified that he is currently employed by the Respondent as a solution architect and has been so employed for about 9-1/2 years; he reports to Judy Thomas now, and did so in 2009 as well.

Kountouriotis stated that his job includes the management of projects, both in their presale and implementation stages. Kountouriotis revealed that in 2009, the economy was not good for the Company but he was aware of the loss of only one major client with whom they had issues and that client discontinued paying its bills; TM was forced to take legal action against the client. Kountouriotis volunteered that he was the project manager for this client whom he did not identify by name. Kountouriotis noted that other employees knew about the difficulties with and the ultimate loss of this client, stating that it was no secret because management conducted biweekly meetings where such matters were discussed with the entire work force—the administrative staff and consultants.

Along these lines, Kountouriotis stated that it was well known among the employees that the Company was making cutbacks in the hours of the administrative employees,¹⁷ he

¹⁶ Grover noted that it was her belief that her complaints about Scott in the context of the Company's ongoing financial difficulties probably led to her discharge. I should note that Grover made this response, over the General Counsel's objection, in answer to my query as to her view of what happened to her while employed at the Respondent. Grover's opinion of why she was let go is in no way controlling on my decision in this matter.

¹⁷ Kountouriotis said the administrative employees included Kathy McDonald, Kim Keller, Shannon (last name unknown), Kim Grover, Lynn Kozoro, and Kiki (last name unknown).

¹⁵ Scott Thomas did not testify at the hearing.

believed in May and June 2009; they were to be reduced to 32 hours per week. Kountouriotis also said that the hours of some of the consultants were also reduced.

Kountouriotis acknowledged that he and Grover had a few conversations about the employees' concerns about the financial status of the Company, and specifically those employees like Keller and Kozoro who were upset about their hours being cut. Regarding Keller, Kountouriotis recalled that she did not discuss the financial status of the Company but was upset about her hours and any discussion between him and her centered on that. Kountouriotis said Keller never discussed Grover in the context of their discussions. Kountouriotis stated that Keller never made any suggestions to him regarding employee work and he could not recall Keller telling him that Grover had told her about things employees could do to be better appreciated by management.

Regarding his conversations with Grover, Kountouriotis said that after the cutback in hours, they discussed in her office where cuts could be had and what employees could be cut to save money and, in fact, Grover had compiled a list of employees she thought could be laid off to produce savings to include Majchurzak as the number one candidate, then Lynn Kozoro, Kiki, and Doug Vanderwarker.

Kountouriotis stated that early on the Friday Grover was scheduled to begin her vacation, he heard some things being said about the Company and decided that he wanted to speak to Judy about the matter. So on that day, pursuant to his request, he met with Judy, Scott, and Mark Thomas, and Kevin Alexander at a restaurant company management frequented—Roosevelt's.

At the meeting he told the gathered managers that he had spoken to a number of employees, to include Lisa Woods, possibly Danielle Winslow, and Kevin Alexander, and was told that Grover had been talking negatively about the Company. Kountouriotis said that Woods told him that Grover told her that "we [employees] would come to work one day and the doors would be closed, [we would have] no jobs," and that the owners were paying other personal bills, e.g., mortgages, cable, and utility, out of company funds. Kountouriotis said that he asked Alexander and Winslow if they had heard these things from Grover and each confirmed that he/she had heard that Grover had been talking to certain employees about the financial condition of the Company and that specifically the owners were paying their personal bills from the company till, and the doors were going to be shut down.

Kountouriotis also recalled that earlier, he had been told similar things by Keller who on one occasion was crying in her office fearful of being fired. According to Kountouriotis, Keller said that Grover told her that she was going to be fired.

Kountouriotis said that he told management that we have a cancer in the Company, that the cancer was Grover.

According to Kountouriotis, he did all the talking, that Kevin Alexander did not say anything, and Judy seemed to be surprised by his revelations about Grover.¹⁸

¹⁸ Towards the end of his examination on direct by the General Counsel, Kountouriotis said that at the meeting Grover was talking about the Company's door closing, wages—specifically those of

Kountouriotis said that Keller told him she was to be fired at least two times, but probably more than that prior to that Friday meeting. Initially, Kountouriotis stated he could not recall whether he had spoken to Judy about Keller's job security prior to the restaurant meeting but, once reminded that he had provided an affidavit, recalled that at some point he did ask Judy if she was going to fire Keller and she said no. According to Kountouriotis, his concerns were for the morale of the Company, the closing of its doors, and Keller being told she was to be fired.

Kountouriotis said that while he was aware that Grover had been released sometime in late August 2009, he was not present on the day in question; he was informed by email by Judy who he said customarily informed the employees that a person had been let go but never cited reasons. According to Kountouriotis, Judy would merely say in the announced departures that we (the Company) had parted ways.¹⁹

Kountouriotis noted that he and Grover had worked together prior to her coming to TM and he, in fact—when she was employed there—taught her to do payroll and some accounting with TM's application. Kountouriotis said when TM lost the big client, he and she talked about cost-cutting possibilities in her office and, in fact, the things he heard that she had said related to cost-cutting and, in that sense, was consistent with the conversations he had with her prior to the Friday restaurant meeting. Kountouriotis also stated that in his conversations with her, Grover had not said anything about the Company's closing.

Kimberly Keller testified that she currently is employed by TM and has been since 2003; her title is client services administrator. Keller said that her duties in 2009 included answering the telephones, retrieving the mail, invoicing, and other administrative tasks as needed. Keller noted that she, along with Grover, Shannon Erisman, Lynn Kozoro, and Kathy McDonald, comprised TM's administrative staff.

Keller stated that in 2009, the Company was financially "hurting" because it had lost a big client, TUI, a matter that was widely known around the office.

According to Keller, she was aware—from the mail—that the Company faced some tax issues in 2009, a problem that actually was of longstanding, at least as of 2003, when the IRS agents actually came to the building. Keller recalled that there was a bank audit at the Company in 2009, but could not recall that there was an issue surrounding this. As to the tax problems, Keller said that this was probably discussed among the office employees who either overheard management—the doors were open—or someone simply spoke about it. Keller also stated that she certainly knew about the tax problems and that she and Grover discussed it. Keller stated that the Company's 401(k) retirement program payments were not always

Majchurzak—the owners' paying their bills from company funds; and who to let go based on Grover's list.

¹⁹ Kountouriotis was shown his affidavit to the Board agent (dated April 23, 2010) in which he averred that Judy would usually just say people were let go for financial reasons because she did not like to cause conflict. (Tr. 122.) Kountouriotis agreed that he had provided that statement.

made on time because funds were lacking; moreover, employees could go on line and look up their pension accounts. Keller noted that Grover was responsible for keeping up with the Company's bank balances and created daily bank balance worksheets²⁰ that she disseminated to Judy.

Keller said that she knew that both Judy and Scott took loans or advances on their salaries because she wrote the checks, and in her view this was not a "secret."²¹

Keller noted that Judy or Scott's taking advances was not novel to 2009, and had been happening since 2003. However, Keller could not recall telling Grover that there was a \$5000 loan to Scott, but may have told her about some (other) loans because she and Grover did talk about company expenditures.

Keller said that prior to July 2009, she was a salaried employee at TM, working 8:30 a.m.–5:30 p.m. Monday through Friday. However, in July 2009, Judy called a meeting with the administrative staff—McDonald, Erisman, Grover, and herself. Ken Jacobsen and Mark may have been in attendance, but she was not sure.

Keller recalled that the administrative staff was informed at the meeting in July that their hours were being cut 2 days per pay period. Keller said that she was so upset that she cried. Keller also recalled that right after the meeting she spoke with Grover about the cuts and that she had daily discussions with her, sometimes quite a few times during the day about the cuts.

Keller said that in their conversations Grover talked about management's use of the company credit cards for lunches and dinners and coffee expenses and other things that could be done to inspire management to rescind the cutback of hours.²² According to Keller, at the time of the cutback in hours Grover suggested to her not to work extra time, to make sure she took her lunch, to start her tour and end it when she was supposed to; Grover said that the employees needed to show management we were important and should be restored to full-time. Keller said that she believed that McDonald and Erisman were present when Grover offered this advice. Keller said that for her part she tried to put Grover's suggestions into practice, but after only 2 days she reverted to her old ways of arriving early at 7:30 a.m., not taking lunch, and working until she was not needed. Keller believed that she talked to Kountouriotis about some of these matters and could have shared with him Grover's advice to her.

Keller volunteered that during their discussions from early on, around October or November 2008 (perhaps 2009) when Erisman had been hired, Grover gave her the impression that Judy intended to fire her, and that Grover mentioned this to her

²⁰ See GC Exh. 5, copies of bank balance worksheets covering the period June 30–July 1, 2009, that Grover prepared. Keller said that she received copies of these types of documents.

²¹ Keller was somewhat equivocal about the matter, saying she could have found out about the advances from Grover, or even Judy herself. (Tr. 155.) She even volunteered that Mark also knew of the advances.

²² Keller was asked by the General Counsel whether Grover made any suggestions to her about what employees could do to inspire the Company to rescind the cutbacks. Keller's response was not altogether clear, but I construed her to be saying that the credit card expenses could be cut back and that would "inspire" the Company to restore their hours. (Tr. 158–159.)

on many occasions that she should watch her back. According to Keller, Grover's admonitions were an ongoing thing for the entire time (Grover was employed). Keller stated that she spoke to Scott and Judy as well about Grover's statements a few times, but this was before July 2009. Keller said that Judy told her that the talk about firing her was untrue. However, Keller said that she trusted Grover so she was unsure where she stood with management.

Keller stated she became aware of Grover's discharge on Friday (August 24) in the morning and actually observed Judy picking up Grover's personal belongings. The General Counsel showed Keller the August 24 email from Judy, but she said she was too upset to read it, then and at the hearing; Keller acknowledged that the "Kim" in the list of employees was she.

Keller noted that no one from management ever asked her about anything Grover may have shared with her, as best as she could recall. Keller, however, stated that she never actually asked Grover to talk to management on her behalf about her hours.

B. The Respondent's Witnesses

Judy Thomas testified at the hearing and stated that she made the decision to terminate Grover in consultation with Scott Thomas, her husband, brother-in-law Mark Thomas, and Ken Jacobsen, the Company's director of sales and marketing.²³

According to Judy, she made the decision to terminate Grover because of the Company's economic difficulties and its need to cut operating expenses drastically, to include the administrative staff of which Grover was a part. Judy stated that it was her view that Grover's duties could be handled by other staff members. Judy unequivocally (under examination by the General Counsel) testified that there were no other reasons to end her employment. Judy acknowledged sending her employees an email covering in part Grover's termination on August 24, 2009, the day Grover was terminated. (Tr. 125.)

Judy also acknowledged that she attended the August 14 luncheon meeting and that Kountouriotis expressed his concerns about Grover. Judy admitted that Kountouriotis told her specifically that after the reductions in hours, Grover told him that administration and management assistants should not work additional hours or put in additional hours or additional effort, nor should they answer emails, so that management would see how much they were needed and then restore them to full-time.

Judy agreed that the meeting began at around 5:05 pm. on Friday, August 14, 2009, the last day Grover was at work before she took her vacation.

Judy testified at length regarding the circumstances that she said ultimately led to Grover's termination.

Judy stated that she is the president of TM and also serves as its chief financial officer (CIO) and secretary; and in her role as CFO she is responsible for the Company's finances and, in fact, handled the general ledger and payrolls. Two other administration members, Lynn Kozoro and Kim Keller, were responsible

²³ Judy Thomas has been referred to here as Judy because her married name is identical to the two other principals of the Respondent. John Scott Thomas has been referred to as Scott. For the same reason as has Mark Thomas been referred to as Mark.

for the bookkeeping chores prior to 2008.

Judy said that in 2008, she determined that a help desk employee was necessary to assist a consultant and Kozoro was not satisfactorily handling bookkeeping, so she transferred Kozoro to the help desk, which in turn created a bookkeeping vacancy.

According to Judy, she found out that Grover had been laid off by a client who asked about possible employment for her with TM. Judy said that she and Mark interviewed Grover and in the course of which she explained to Grover that the Company had recently worked out an installment agreement with the Michigan tax authorities, that there was considerable bank indebtedness currently on the books, that things were, nonetheless, improving in those areas but she needed help in the office.

Judy recalled that during Grover's interview Mark informed Grover of the need to maintain confidentiality of company information, and that she reinforced his discussion. Once Grover was hired, Judy said that she worked closely with her with regard to business matters. Judy admitted that in the course of their dealings Grover informed her of her concerns about the business, including taxes not being timely paid, the scheduling of payments for certain items, and occasionally advising that certain matters required her more immediate attention. According to Judy, she and Grover worked well enough with each other with no arguments, let alone threats to fire her; Grover was a satisfactory employee.

As to the Company's business activities, Judy stated that the Company signed a lease for additional space on December 1, 2008, and moved in the space on January 17 or 18, 2009, but Grover was not involved in this decision. Judy noted that Scott and she were not in complete agreement about the move, but the old space was designed for 8 consultants but was accommodating 16 and there were many complaints from the consultants, so the move to the expanded space was made.

Judy said that TM had two major clients, Demmer and TUI. According to Judy, Deemer brought in about \$29,000 per month and TUI, a 2-year project, around \$70,000 per month. Regrettably, according to Judy, her Company lost both of these major clients in early to mid-2009, and even had to sue TUI for \$147,000 it owed as of March 2009. The immediate consequence of these losses was a drastic hit on the Company's cash flow—around a loss of \$100,000 monthly—and consultants with no work in what she described as the worse economy in memory in Michigan. Judy said that the Company thereupon embarked on efforts to find more work and also to explore areas within the Company to garner costs savings. Judy, noting that 70 percent of the Company's operating expenses were for personnel with the majority of the consultants working on the TUI project, management was compelled to meet almost daily to deal with financial issues.

Judy recalled that the Company's management team—Scott, Mark, Jacobsen, and herself—examined the Company's billable utilization rates²⁴ for the consultants, phone expenses, rent

expense, and Scott's leased vehicle costs. In response to the Company's predicament, management considering jettisoning the expanded suite space but actually purchased the leased vehicle. Also, according to Judy, the Company finally resolved to find more work projects but also to consider layoffs of employees.

Regarding layoffs, Judy stated that in May 2009, the Company considered laying off Paul Shifren, a manager of a consulting team who received an annual salary in the \$125,000–\$135,000 range; Kiki Hall, a member of the Solomon software team; a marketing manager, Andre Dolan; and administrative employees Kim Keller and Kim Grover. However, Judy said that at that time only Shifren was let go.

According to Judy, around the June–July 2009 time-frame, when TUI decided not to pay its outstanding bills, the management team reviewed the utilization reports for the consultants and considered additional layoffs. Towards this end, Judy said that she prepared financial data spreadsheets²⁵ on July 7 and 17, and August 5, 2009, that she and the management team used to consider possible layoffs of employees. Judy stated that she wanted to avoid layoffs because of the difficulty of finding persons possessed of the specific technical skills needed to do consulting in the software field.

With that primary consideration in mind, Judy said that she included for possible layoffs nonconsultants Kim Grover and Kiki Hall, along with aforementioned Paul Shifren and consultants Tammy Cowart and Judson Smith. According to Judy, she did not act on this plan on July 7 (R. Exh. 2(a)), although Shifren had been let go as of May, but was still entitled to his last paycheck on July 7.

Judy stated that management decided to wait until the July 15 billing period before acting on the July 7 spreadsheet. Judy recalled that before preparing the second (July 17) spreadsheet, she and Jacobsen happened to lunch with a client also experiencing economic challenges. According to Judy, the client suggested to them that reducing employees' hours to save money was superior to laying them off; in this way money could be saved but the work force could remain essentially intact. Judy said that she presented this plan to the management team which approved the plan. Judy noted that by this time Shifren was no longer employed nor was Cowart, so the second spreadsheet (R. Exh. 2(b)) prepared on July 17 reflected the savings to be realized by reducing the hours of Grover, Keller, Erisman, and McDonald, the administrative staff; along with Dolan of marketing; two consultants in the Dyamics GP team; two consultants on the Dyamics SL team; and one person from the CRM team. Judy noted that while Grover's hours were reduced to save her job as of July 17, she was still on the line to be fired as of that date. Judy said that, nonetheless, she decided to retain her at that time.

Judy stated that on July 17, 2009, she conducted the first of several meetings to apprise employees of the reduction in their

²⁴ Judy explained that a consultant is generally expected to bill a client for services provided at an hourly rate of 60 percent of the 160 hours comprising a work month. According to Judy, all consultants except three were expected to reach the billable utilization rate. How-

ever, as of April 2009, Judy said that the consultants were billing at 30–40 percent of the utilization rate.

²⁵ Judy identified R. Exhs. 2(a)–(c) as copies of the spreadsheets she prepared to discuss possible layoffs during the period covering July 7 through August 5.

hours with the administrative staff; Grover, Keller, Erisman, McDonald, and possibly Dolan were called in and told of the reduction. According to Judy, she told these employees that the economic conditions and the Company's inability to achieve the 60-percent utilization rate necessitated drastic cost reductions among all of the company teams. Judy said that she also told these employees that she (the Company) would prefer that they not discuss the reduction with anyone until she had the opportunity to speak to the other employees affected by the hours' reduction measure.

Judy volunteered that not only was she personally upset over the matter, but so was Grover who queried whether there was some other way to cut costs other than cutting her hours. Judy said that she asked the employees for cost-saving suggestions and they responded with coffee and candy cuts, which would amount to savings of about \$200 to \$250 monthly.

Judy noted that following the reduction of hours, the Company's cash flow position improved for purposes of payroll but collections/receivables did not, so the management team considered her August 5 version of the spreadsheet (R. Exh. 2(c)), the utilization reports, held more meetings, and had more discussions of who would be next for layoff or termination. According to Judy, Grover's name again came up in these discussions and on August 10, she made the decision to terminate her. Judy recalled that around August 10, she and Grover discussed layoffs in general and that Grover asked her at the time whether she (Judy) planned any more job cuts; and if she had so planned, to wait until she (Grover) returned from her scheduled and paid-for vacation trip. Judy stated that she did not inform Grover at that time that there were going to be any further layoffs. Judy volunteered that, in fact, this conversation took place in the hallway of the office, was overheard by other employees, and taken as a kind of joke. (Tr. 205.)

Noting that the August 5 spreadsheet included the same employees being considered for layoff or termination, Judy stated that at the time the Company was not realizing the kind of needed "effective" cash flow on the payroll side of the ledger. In addition, according to Judy, she was doing most of Grover's work coupled with her belief that Grover's assignments could be handled by other members of the administrative staff and still maintain internal efficiency. Judy said that she planned to assume Grover's payroll and general ledger duties and the other administrative staff, McDonald and Keller, would take over payroll, the receivables and bank account reconciliations at a cost "far less" than Grover's rate of pay.

Judy stated that while her decision to fire Grover was made on August 10, she did not inform her at that time because Grover was scheduled to go on a prepaid vacation and that she had earned her company-paid vacation time.

Turning to August 14, Judy acknowledged meeting with Kountouriotis, Kevin Alexander, Jacobsen, and Scott at the Roosevelt Restaurant, and at that meeting Kountouriotis told her about things that Grover had said that affected her in an extreme way, leaving her mortified and feeling betrayed. (Tr. 228.)

Judy explained that at about 4:45 p.m., she was asked to attend a meeting with two of her senior consultants—Kountouriotis and Alexander—and they insisted that the meet-

ing not be held in the office.

According to Judy, Kountouriotis, a person not normally excitable or agitated, was clearly upset that day, began the meeting by saying we have a cancer in the Company and that Grover was the cancer, and to her he was very serious.

Judy said that she asked him to explain and Kountouriotis told her that a number of employees told him that in conversations with Grover about the financial condition of the Company, Grover had said that managers were paying for their mortgage and utility bills from company funds, that taxes and the 401(k) contributions were not being paid and, moreover, that Grover had discussed other employees' salaries. Judy said she asked Kountouriotis how he knew this and he told her that he had spoken to the affected employees and in some instances he had heard such things from Grover herself.

Judy stated that she met with Mark, Scott, and Jacobsen at the company offices on the following Monday (August 17) to discuss an approach to deal with the Grover matter. Judy noted that the managers had been told that employees were sending out resumes and were going to quit because of the financial condition of the company so they decided to speak with the employees who had directly heard what Grover had said; Judy said that she conducted the interviews herself.²⁶

Judy stated that she had decided to fire Grover the morning of August 14 (before the meeting at the Roosevelt) and that she was to be notified of her decision that morning. But because Grover was going on vacation, Judy said that she decided not to lay her off that day and further she had no opportunity to discuss her decision with her. Judy acknowledged, however, that she does not (ordinarily) discuss her termination decisions with employees prior to letting them go because the decision had already been made. (Tr. 230.)

Turning to August 24, Judy said that she and Mark met with Grover at around 8:50 a.m. Judy said that she told Grover that she was being let go for economic reasons and that the decision was final. According to Judy, Grover appeared stunned by the announcement, saying that she (Grover) did not understand. According to Judy, Mark then said to Grover that she knew how things had been going on at the Company—we did not have the billings or cash flow, etc. According to Judy, Grover persisted in asking for more information about the decision and Mark said we (management) also had information that she (Grover) should have understood was very important for her to keep confidential, and that management made that very clear at the outset of her employment. Judy admitted that she told Grover, "and you wouldn't believe what I have been hearing in the last week." (Tr. 215.)

Judy noted that Grover denied divulging to anyone anything confidential in nature and specifically denied discussing salaries with any employees.

According to Judy, Grover also told Mark that she knew this would happen if she spoke to him about her concerns about Scott and his salary advances. Judy acknowledged that this subject had been broached at an August 19 management luncheon meeting, but this had nothing to do with her decision to lay

²⁶ Judy did not identify the employees she interviewed or what each specifically stated to her.

off Grover. Judy acknowledged that at this August 19 meeting, Grover's advocacy of reductions in various company expenses was also discussed.

Regarding Grover's concerns about cost cutting, Judy admitted that in conversations over 4–5 months, Grover expressed such concerns, specifically that some employees, namely Majchurzak, Cowart, and Kiki Hall, were being paid too much for what they were contributing to the Company. Judy stated that she never admonished Grover for telling her these things, rather she tried to explain to her the Company's rationale for retaining these employees.²⁷

After Grover was let go, Judy admitted that she disseminated the August 24 email to all of the company employees, mainly to calm things down in the Company in the aftermath of Grover's layoff—as she put it) to rally the troops and make things better and to curtail the spreading of rumors about the financial condition of the Company.

Mark Thomas testified that as TM's chief information officer he was and is in charge of the Company's information technology operations. Mark also stated that he along with his sister-in-law Judy and his brother Scott comprise the Company's board of directors.

Mark stated that Grover began working for the Company in the fall of 2008, and he (and Judy) interviewed her for the controller position for which she was hired. Mark recalled that in the interview he explained to Grover the nature of her duties in the position, emphasizing three areas that were to be considered of very high importance. According to Mark, he told Grover that if she were hired he expected her to maintain confidentiality of the Company's financial information; the confidentiality of private employee information, such as employee bankruptcies and garnishments; and the confidentiality of customer information. Mark said that Grover told him that she understood, and in fact she knew that these areas of confidentiality were fairly normal requirements for a controller position.

Turning to the financial condition of the Company, Mark noted that beginning about January 2009, the Company was not in good financial shape, was taking in less money than it was spending resulting in a negative cash flow because some of the firm's customers declared bankruptcy while others simply stopped doing business with TM or refused to pay their bills, necessitating legal action to collect. As a result, management determined by the late winter and early spring of 2009, that the Company had to cut costs by as much as \$50,000 per month.

Mark recalled that the management team—Judy, Scott, Ken Jacobsen, and himself—met during this period and discussed various layoff scenarios to achieve the needed cost savings. According to Mark, the scenarios included possible layoffs of

consultants, administrative staff, and the sales and marketing staff—basically across-the-board staff cuts.

Mark recalled that the management meetings dealing with those issues were often very contentious and complex because some of the proposed layoffs—for example, consultants currently working on projects—could cause a negative effect on the Company's finances. According to Mark, the management team prepared spreadsheets incorporating different layoff scenarios involving different employees and these were presented at the management meetings when these issues were discussed.²⁸ Mark stated that the basic or “number 1” component or element associated with a layoff determination was the effect of the employee's reduced salary on the Company's bottom line and in July 2009, the Company's financial condition was not good, the cash flow situation was poor.

Mark recalled that one of the management team members, he could not recall who, broached a cost-savings measure that entailed reduction of hours as opposed to layoffs which would keep employees working but at the same time help the Company's cash flow. According to Mark, management decided on this course and informed 10–11 employees who had the least amount of current work that their hours would be reduced. However, Mark stated that the employees were informed that when the Company got more work, their hours would be restored. Mark believed that the plan was announced in a companywide conference call.

Mark noted that even with the reduction in hours in place, the Company's financial condition did not improve, at least immediately, and the management team continued to discuss further cost cutting in the form of layoffs and other cost-cutting measures. Accordingly, around the end of July and beginning of August 2009, Mark stated that management decided to lay off a consultant—Cowart—and administrative staff member Grover²⁹ who was due to go on vacation sometime in August.

Mark admitted that Grover and he had previously discussed cost-cutting measures and recalled that Grover thought savings could be realized on reduction of telephone service and in other areas. Regarding Scott's taking salary advances, Mark recalled that Grover did not think that this was appropriate (under the circumstances). Mark testified that he was never angry with Grover for expressing her stance on the matter and told her that he would check on the matter. Mark volunteered that at the time his concerns centered on whether Scott's salary advances were being accounted for appropriately.³⁰ Mark noted that while he supported the decision to lay Grover off, Scott's advances did not factor into the layoff decision which was made

²⁷ On cross-examination, Judy stated, however, that Grover's job performance was a factor in her discharge to an extent, mainly because she had to do much of her work. Judy went on to say that Grover had very strong opinions about billing—items to be billed and those that were not—with which she (Judy) did not necessarily agree. According to Judy, she was not sure (comfortable) that Grover understood how the Company, functioned or what was necessary from the client's prospective for the Company to bill for certain things but not to bill for others. Nonetheless, Judy conceded that Grover did have a handle on how the books should be kept. (Tr. 241–242.)

²⁸ Mark identified R. Exhs. 2(a)–(c), the spreadsheets prepared by Judy and presented at the management meetings.

²⁹ Mark was not sure but believed that the decision to lay off Grover was made about August 7 or 10.

³⁰ Mark stated that he told the members of the management team that he was aware of the advances and reminded the team that there was an audit coming up in a few months and if (anyone) was taking advances, this had to be documented and paid back as soon as possible. (Tr. 76.) Mark later in his testimony stated that the bank audit was scheduled for the fall of 2009. Also in 2009, according to Mark, the Company was scheduled to be audited by Michigan employment authorities (MESAC). (Tr. 289–291.)

not then, but before Grover went on vacation.

Regarding his opinion of Grover, Mark stated that the only time he was critical of her was when she was on vacation and employees (Kountouriotis and Alexander) as he later found out, at a meeting he did not attend, told the management team that Grover was inappropriately sharing confidential information.

Directing himself to the day Grover was told of her layoff—August 24—Mark said that he and Judy met Grover that morning and Judy gave Grover the word that they were parting ways, but Judy did not initially give Grover a reason. However, according to Mark, Grover was very concerned and wanted to know a reason and pressed them for an answer. According to Mark, Judy told her the Company had to cut back on costs. According to Mark, he told Grover that he had heard that she was sharing confidential information with the other employees and that we did not like it. Mark stated that Grover emphatically denied sharing any information. However, Mark stated that he had heard from the managers at the meeting that Grover was telling employees that the Company was going out of business, that employees needed to send their resumes out; that the Company was in a bad financial condition, and the officers were paying their mortgages with company funds. Mark admitted that when Grover initially brought her concerns about Scott's advances, she did not mention any of these matters to him. Mark also volunteered that at the time he did not believe Grover was actually sharing information about the Company's finances to anyone outside the Company but this was, nonetheless, a concern.

Mark stated that since this information was relayed to him after the meeting by the management team, he contacted Kountouriotis and some other (unidentified) employees and asked whether the statements attributed to Grover were made by her, and they confirmed what he had heard.³¹

III. APPLICABLE LEGAL PRINCIPLES

The complaint, as previously noted, essentially alleges that the Respondent violated Section 8(a)(1) of the Act, first, by discharging Grover because she engaged in protected concerted activities; and, second, by interfering with the rights of its employees guaranteed under Section 7 of the Act.

I believe that it will be helpful to all to set out the applicable legal principles enunciated by the Board governing violations of Section 8(a)(1) of the Act.

Section 7 of the Act (in pertinent part) provides that “[e]mployees shall have the right to self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”³² Thus, in short, employees have a statutory right in concert to take action for better job conditions.

³¹ Mark said that he may have spoken to Kim Keller but cannot recall this with confidence. However, Mark said the decision to lay off Grover was already made, so anything Keller may have said had no bearing on her layoff.

³² 29 U.S.C. §151.

Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.”³³ The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act.³⁴

Thus, it is violative of the Act for the employer or its supervisors and agents to engage in conduct, including speech, which is specifically intended to impede or discourage employees from engaging in union or other activities for their mutual aid and protection. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce or interfere is an objective one, requiring an assessment of all the surrounding circumstances in which the conduct or statement is made. *Rock Valley Trucking Co.*, 350 NLRB 69, 79 (2007). *Electrical Workers Local 6 (San Francisco Electrical Contractors Assn.)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

Significantly, the Board has held that an employer may not maintain rules that forbid employees from discussing their working conditions with each other. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

Lastly, Section 8(c) of the Act provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act because it believed that the Board had made it “excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization.”

As noted, Section 8(a)(1) also entitles employees to engage in concerted activities for their mutual aid and protection. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court affirmed that employees with no bargaining representative or established procedure for presenting their grievances may nonetheless take collective and concerted action to air their grievances regarding terms and conditions of employment.

In this regard, the Board has determined employees who discuss their wage rates engage in protected activity. *Fredericks-*

³³ 29 U.S.C. §152.

³⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959).

burg Glass & Mirror, Inc., 323 NLRB 165 (1997). More recently, the Board has held that employees who complained about favoritism, wages, and bonuses engaged in protected activity. *North Carolina License Plate Agency #18*, 346 NLRB 336 (2006). However, employees who misappropriate wage or other financial information of the employer may lose the protection of the Act even if they are engaging in concerted activity. *Roadway Express*, 271 NLRB 1238 (1984); *International Business Machines Corp.*, 265 NLRB 638 (1982).

In likewise, the Board has held that employee conduct characterized as “snooping” will not be extended the protection of the Act. *Canyon Ranch, Inc.*, 321 NLRB 937 (1996).

The Board has defined concerted activity. When an employee acts with or on the authority of other employees, the employee is said to be engaging in concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (*Meyers II*), cert. denied 487 U.S. 1205 (1988).

As noted in the recent case, *Asheville School*³⁵ in which the administrative law judge was upheld, the following summary of the Board’s interpretation of concerted activity (taken from *Diva, Ltd.*, 325 NLRB 822 (1998)) is instructive:

Since *Meyers* [*Meyers Industries (Meyers I)*], 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board has found an individual employee’s activities to be concerted when they grew out of prior group activity, when the employee acts formally or informally, on behalf of the group, or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. However, the Board has long held that for conversations between employees to be found protected concerted activity, they must look toward group action and that mere “gripping” is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and its progeny. *Id.* at 830.

As the Board stated in *Holling Press, Inc.*, 343 NLRB 301 (2004):

In order for employee conduct to fall within the ambit of section 7, it must be both concerted and engaged in for the purpose of “mutual aid or protection.” These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

Accordingly, employees who simply pursue a personal claim, even with the assistance of other employees, may not be extended the protection of the Act under *Holling Press, Inc.* In short, the employee must be shown to be seeking a collective goal and may not simply advance his or her personal claim.³⁶

Notably, the Board has held that an individual employee who takes some action or expresses some concern about work conditions without a discussion among other employees is, nonetheless, concerted when the action or expression by the individual

is a logical outgrowth of the concerns expressed by the other employees.³⁷

The Board has held that concerted activity encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action and even if one employee acts alone during some phase of concerted presentation of grievances, this does not render his action outside the protection of the Act.³⁸ Moreover, where other employees speak to an individual employee about matters concerning their terms and conditions of employment and rely on that employee to act as a liaison to management, the employee need not be expressly “appointed” or “nominated” as a spokesperson in order for the employee’s action to be found concerted.³⁹

Similarly, employees whose complaints may differ may, nonetheless, be concerted where they were united in their protests about terms and conditions of employment. *Hahner Foreman & Harness, Inc.*, 343 NLRB 1423 (2004).

The Board has held that since wages are the most important and vital term and condition of employment, employee complaints about wages are protected activity. *Rogers Environmental Contracting, Inc.*, 325 NLRB 144 (1997). Accordingly, where one employee informs another employee that he has overheard supervisors saying that the latter employee was going to be fired, the Board has held this to be protected concerted activity since the communication was an attempt to protect the employee’s employment. *Tracer Protection Services*, 328 NLRB 734 (1999).

Notably, in a situation where employees discussed their dissatisfaction with their working conditions and what the employees could do about it, and an employee suggested a specific plan or action to get management’s attention, the Board has held that the action of the employee was concerted and protected.⁴⁰

The Board has recently held that concerted activity does not depend on employees agreeing in advance to protest together and that as long as the employees’ complaints were motivated by their opposition to their employer’s actions regarding job conditions, the employees’ motives need not be similar—the overriding commonality of their action is the key to the concerted issue. *Worldmark By Wyndam*, 356 NLRB 765 (2011).

While employees may vindicate their Section 7 rights in a concerted fashion, they may not conduct themselves in such a manner as to lose the protections of the Act. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Winston Salem Journal*, 341 NLRB 124 (2004). As a general proposition, employees may not engage in acts constituting disloyalty or making misleading, reckless, or maliciously untrue statements about or regarding their employ-

³⁷ *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992).

³⁸ *Compuware Corp.*, 320 NLRB 101 (1995).

³⁹ *Midland Hilton & Towers*, 324 NLRB 1141 (1977).

⁴⁰ See *JCR Hotel, Inc.*, 338 NLRB 250 (2002), where an employee suggested that the employees stage a walkout when the hotel was busy in the context of their discussion about their working conditions to include the employer’s failure to provide a customary daily meal in order to get the employer to pay attention to their dissatisfaction, and the Board held the employee’s action to be concerted and protected.

³⁵ 347 NLRB 877 (2006).

³⁶ See *Gartner-Harf Co.*, 308 NLRB 531 fn.1 (1992), where the Board noted that an employee’s personal complaints about his own lack of work hours were deemed not protected.

er.⁴¹ *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448 (2005). In short, employees cannot engage in conduct deemed sufficiently egregious so as to remove it from the protection of the Act. *White Oak Manor*, 353 NLRB 795 (2009).⁴²

Notably also, the Board has held that an employee possessed of special custody of confidential wage and salary information contained in the employer's personnel records, and aware that her established duties required that she maintain the confidentiality of this information, was lawfully discharged when she disclosed the information in discussions with fellow employees discussing wages in violation of the employer's policy prohibiting such discussions. *Asheville School*, 347 NLRB 877 (2006).

When the alleged 8(a)(1) violation turns on the employer's motive in taking an adverse action against an employee, the Board requires that the charge be analyzed under the framework set out in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).⁴³

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights. Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a line or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, she is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.⁴⁴

Once the General Counsel establishes initially that the employee's protected activity was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Liberty Ashes &*

Rubbish Co., 323 NLRB 9 (1997).

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,⁴⁵ departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of a union supporter from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf'g. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Services Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Bonta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medic One, Inc.*, 331 NLRB 464 (2000).

The employer's burden under *Wright Line* requires it "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enf'd. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his (protected) union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

⁴¹ See *Case Farms of North Carolina*, 353 NLRB 257 (2008), where the Board held that two employees who served as spokespersons for the other employees complained about working conditions to local newspaper reporters but did not lose the protection of the Act. Similarly, see *Valley Hospital Medical Center*, 351 NLRB 1250 (2007), where employee complaints about working conditions were reported in a newspaper. However, where an employee sent letters to her employer's corporate management and to the primary customer at the facility, coupled with threats to send certain company information to outside media, the Board held that her conduct was not protected because of malicious falsehoods contained in the letter and her statements were made with knowledge of their falsity or at least in reckless regard for their truth. *TNT Logistics North America, Inc.*, 347 NLRB 568 (2006).

⁴² See *Tampa Tribune*, 351 NLRB 1324 (2007), when an employee made a single profane and derogatory reference to the employer's vice president, the Board held under the circumstances the comment was not sufficiently opprobrious to cause him to lose the protection of the Act.

⁴³ See *General Motors Corp.*, 347 NLRB No. 67 (2006) (not published in Board volumes), where the Board stated *Wright Line* applies to all 8(a)(3) and (1) allegations that turn on employer motivation.

⁴⁴ *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine, LLC*, 337 NLRB 644 (2002).

⁴⁵ The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer's failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.*, 341 NLRB 492 (2004).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical Inc.*, 343 NLRB 408 (2004).

IV. THE POSITIONS OF THE PARTIES

The General Counsel contends first that when Grover discussed with her fellow employees how the Respondent's financial issues, with which as the controller/bookkeeper she was in a position to know, were affecting their employment conditions and went on to suggest to them ways by which they would protect their jobs and brought the employees' concerns to the attention of management, she was engaging in concerted protected activity. The General Counsel next contends that the Respondent's management ultimately on August 14 became fully aware of Grover's activities, and in particular that she was communicating with other employees concerned about their hours being cut and the need for ways to cut costs so that the employees could return to full-time work. The General Counsel notes that even before August 14, Grover specifically confronted Scott Thomas about his taking salary advances, when at the time employees were upset over having their hours cut. Grover notes she also spoke directly to Mark Thomas about Scott's obtaining loans and advances on his salary that she believed he could not repay. During this encounter, Grover also raised with Mark certain activities that she felt were inimical to the Company's balance sheet such as the weekly management lunches, retaining low performing consultants on the payroll, and haphazardly making the 401(k) contributions and paying due taxes.

The General Counsel argues that the August 14 luncheon convened by the Respondent, of course, at the insistence and instigation of Kountouriotis to expose Grover's multiple conversations with her fellow employees regarding the financial condition of the Company and management's handling of the situation. The General Counsel submits that at this meeting management was directly and expressly told in detail what Grover had been telling employees about management's conduct or conduct of the affairs of the Company, and what the employees could do to show how much they were needed in order to have their full-time hours restored.

The General Counsel submits that Judy Thomas' reaction—mortification, betrayal, and anger—to Grover's protected activities in support of her fellow employees directly led to the Respondent's decision to terminate Grover on the Monday following the Friday luncheon meeting. On August 24, upon Grover's return from vacation, she merely faced a fait accompli—her belongings were already packed up and she was summarily terminated.

The General Counsel submits that on this record the evidence establishes overwhelmingly that Grover was terminated in retaliation for her having engaged in concerted protected

activities in violation of Section 8(a)(1) of the Act.

The General Counsel also contends that the Respondent's defenses—on the one hand, Grover was terminated for no other reason than cost cutting and on the other that Grover had performance issues 3 to 4 months prior to her termination—were false and pretextual. She argues that aside from the shifting nature of the Respondent's defense, the testimony of Mark and Judy regarding the August 24 termination meeting clearly implicates their consternation over what they had heard about Grover at the luncheon and their claim that Grover breached the Company's confidentiality policy. The General Counsel submits essentially that by their own testimony, both Judy and Mark undercut any claim that Grover was terminated solely for economic reasons and that she would have been let go for that reason in spite of having engaged in protected activities.

The General Counsel submits that the Respondent failed to establish its defense with regard to Grover's termination.

Turning to the August 24 email, the General Counsel contends that this announcement disseminated to all of the Respondent's employees was inherently coercive and threatening to the employees. She submits that at the time, the Respondent had just that day terminated Grover and her termination was specifically addressed in the email, and specifically "that she had reportedly shared some of her thoughts and concerns with members of our staff, and in her position of confidentiality, that is not acceptable."

The General Counsel notes that the email goes on to instruct the employees that "If anything is concerning you, please talk with a [sic] Management employees not each other." The General Counsel submits that under the circumstances, a TM employee would reasonably tend to believe that the Respondent looked unfavorably—as an act of disloyalty—upon any employee who discussed his wages, hours, and other conditions of employment with other employees and, moreover, the employee, like Grover, would be terminated. The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by disseminating the August 14 email to its employees.

The Respondent asserts that Grover was laid off for economic reasons stemming from the Company's economic circumstances. The Respondent submits that the critical statements about management attributed to Grover by the employees and disclosed through Kountouriotis at the August 14, 2009 luncheon were made after the decision to let her go and thus were not germane to that decision.

The Respondent submits that the decision to determinate Grover had little relationship to either her work performance or any alleged efforts on her part to improve the working conditions of her coworkers. The Respondent contends that in point of fact management had actually encouraged suggestions from Grover to improve conditions at the Company during the parlous economic conditions extant at the time. The Respondent asserts that as testified to by Judy and Mark Thomas at the hearing and buttressed by the spreadsheets adduced there, Grover was let go only after considerable deliberation by management because she was the highest paid of the administrative workers and other lower paid administrative employees could do her job, at least in substantial part.

The Respondent contends that because Grover was an adequate employee, out of consideration for Grover, Judy Thomas decided to postpone her termination until after Grover returned from the vacation she had earned.

The Respondent concedes that the revelations by Kountouriotis were shocking to management and ironically the statements purportedly arose from the very employees whose interests Grover was supposedly protecting. However, the Respondent submits that irrespective of the hurt, betrayal, and anger felt by Judy, the decision to terminate Grover had already been made because of the Company's financial troubles and to that point, Grover's layoff was early on contemplated, but simply not acted on.

The Respondent finally asserts that if, *arguendo*, the Act may have been violated because of the coincidental timing of the luncheon meeting with management at which an employee advised that Grover was a "cancer" for what she had been telling her coworkers, and Grover's subsequent notification of allegations against her by coworkers and her termination by management when she returned from vacation, the Respondent is, nonetheless, entitled to dismissal of the charge. The Respondent contends that if Grover made the statements attributed to her by Kountouriotis, she breached her obligation of confidentiality as the custodian of the Company's financial records and actually made false statements about the Company's finances, and on which grounds she could have been fired for cause. Moreover, making such statements would not be protected under Section 7 of the Act.

Turning to the August 24 email to the employees, the Respondent asserts first that it was disseminated to address the Company's economic-based decision to lay off Grover as well as its concern that Grover had disseminated information deemed confidential by TM.

Second, the Respondent asserts that the email was designed to rally the remaining employees and to encourage them not to spread rumors but to bring rumors to the attention of management.

The Respondent contends that given such purposes, there was no threat implied or expressed in the email. The Respondent submits in essence that the email only sought to rally the spirits of the workers, calm their fears, and reduce rumor mongering among them, all in the context of the Company's precarious financial condition and some employees' reactions thereto that created a fear-laden atmosphere. Accordingly, the Respondent contends that it did not violate the Act by disseminating the August 29 email.

Discussion and Conclusions

The major or predominant issue involved here is whether Grover engaged in protected concerted activities. Secondly, if she did engage in protected conduct, did the Respondent sufficiently establish that it terminated her for legitimate reasons—breach of the Company's confidentiality policy and/or for the more strongly advanced defense, economic necessity; and that irrespective of Grover's having engaged in conduct protected by the Act, she would have been let go. As to the email that the Respondent through Judy Thomas issued to the employees, the issue there is whether this notice acted as a

prohibited interference with rights guaranteed them under the Act.

In point of fact as I view things pertinent to this litigation, the trigger event for this dispute was the Respondent's decision to cut the work hours of the administrative staff—Grover and three others—on or about July 16, 2009. This action was a signal on at least two fronts—one, the Company was in a serious financial predicament, and two, the administrative staff individually was going to have to take what amounted to an immediate 20-percent pay cut, that is a reduction of 16 hours per 80 hours per pay period. Naturally, the administrative staff was very upset about this and expressed their concerns to Judy on the spot. So certainly the Respondent was on notice that this announcement was not received with alacrity by the affected employees, most notably Grover who, in her position was privy to the operating costs of the business, immediately asked if other cost-cutting measures could be implemented as opposed to the cutting of her and the other administrative staffer's hours.

With these findings in mind, in my view two important facts are established on this record. One, as of around July 16, the Respondent's financial condition was such that its management legitimately deemed it necessary to consider and make changes in its operation to reduce its operating costs to include layoffs of employees and, as it turned out, reduce employees' work hours. The second point established in my view is that about that same time of their cut in hours, several employees became concerned about the condition of the Company and management's response thereto and engaged in discussions between and among themselves about the matter. Grover, deeply affected financially by the cuts in her hours but also the one employee who had access to the Company's expenditures and costs, clearly emerged as the employee taking the lead in the protests of other employees who had their hours cut and after a time became the one employee to whom the others went and with whom they consulted about the Company's condition.

As a preliminary matter, I found Grover to be an eminently credible witness. On the witness stand, she appeared calm and forthcoming and more importantly, the substance of her testimony was corroborated by other witnesses.⁴⁶

Notably, Grover, who was fully aware of the Company's financial problems—especially the loss of two major clients—expressed to both Judy and Mark her concerns about the Company's expenditures and suggested ways or measures the Company could undertake to reduce costs. More pointedly, Grover expressed her concerns to Mark about one of the principal's—Scott—taking salary advances when the Company could not afford it and especially when other employees had their hours reduced. Having set out the pertinent parts of Grover's (and Keller's and Kountouriotis') testimony in some detail, I will not reiterate it here. Suffice it to say that after July 16, Grover to a certainty in my mind engaged in concerted activity on her own

⁴⁶ The Respondent suggests that Grover was not a credible witness in part because she cited "lack of work" as grounds for her discharge to the Michigan unemployment authorities. I do not think that Grover's application for unemployment benefits, as I understood the workings of that system and its associated process, in any way diminished her credibility.

and on the behalf of other employees by protesting and discussing with them her and their objections to their pay cuts—reduced hours—and certain steps the employees could take to persuade management to restore their normal hours.

While Grover was assuredly looking out for her own pecuniary interests, she also participated in discussions with other similarly financially affected employees regarding the Company's move to cut their hours. It seems clear that in the view of the employees (including Grover and Kountouriotis), other measures such as not paying idle consultants their salaries or other expenses could be implemented to save money. Grover later expressed these collective concerns to the principal managers, namely, Judy, Mark, and Scott. Accordingly, in my view Grover's actions were concerted in nature, reflecting her and her fellow employees' essential disagreement with the Respondent's cost-saving measures which affected an important term and condition of their employment—their wages. I would find and conclude, therefore, that Grover's conduct was protected by the Act.

Regarding the Respondent's knowledge of Grover's actions, little need be said. The credible evidence—from Grover and Keller in particular, but Kountouriotis as well, indicates that Judy and Mark knew through Grover that the employees affected by the cut in hours were not pleased by that particular cost-saving measure. In fact, Judy testified that Grover had suggested to her other ways to reduce costs, and in likewise Mark testified that Grover expressed to him her displeasure with Scott's salary advances (while other employees faced cuts in pay), along with her concerns about the expensive management lunches and over-paid consultants.

It is worth noting that during the time Grover expressed her concerns about management's approach to saving money, the Company's financial condition remained in doubt. However, irrespective of the company's finances, Grover was never informed that her position was in jeopardy. Rather, Grover was considered a good employee and as of the time she took her vacation—August 14—the Company, facing a bank audit, especially needed her services upon her return, at least according to Judy.

This takes us to August 14, 2009, the day of the meeting instigated by Kountouriotis with the Respondent's management team. As I have set out in this decision, Kountouriotis told the gathering of managers that Grover was a “cancer” in the Company and that she had communicated to the employees certain information about the managers' purported misuse of company funds and that she had divulged possibly confidential information about the employees. Judy testified that upon receipt of this information she was upset and felt betrayed by Grover, but that this information had nothing to do with her decision to let Grover go; she had made that decision the morning of August 14, but only because of the Company's economic situation.⁴⁷

While I do not believe that Grover made the statements—and

⁴⁷ I note that Judy earlier in her testimony stated that she had made the decision to let Grover go on August 10. However, upon my examination, Judy said that she made the decision to discharge Grover on the morning of August 14 before the Roosevelt luncheon meeting. (Tr. 230.)

she credibly denied making them—attributed to her by Kountouriotis who claimed that he had been told these things by other employees, the statements, even if false, directly related to the essence of Grover's protest of the cuts in her and (others) hours while management in her view was improvident in the use of company funds.⁴⁸ Accordingly, with Judy's denial of connection of the statements to her decision to discharge Grover in mind I, nonetheless, would find and conclude that those statements, and Judy's ultimate decision to discharge Grover on August 24 upon her return to work, were sufficiently connected in time to establish an unlawful motive for Grover's discharge. According, I would find and conclude that the General Counsel fully met her burden under *Wright Line*.

Turning to the Respondent's defense or rather defenses, the Company seems to place its principal reliance on its economic defense; that is, Grover's release was due to the Company's troubled economic situation. The Respondent also seems to rest its decision to discharge Grover at least in part on her having divulged confidential information about its employees. In any case, the Respondent contends that its decision to discharge Grover was not based on or motivated by her statements and/or conduct reflecting her dissatisfaction with or protest of the cuts in her and other employees' hours.

First, contrary to the General Counsel, I would find and conclude that the Respondent clearly established that its economic and financial conditions during the material times here—mainly the period immediately before July 16 through August 24, 2009—were sufficiently perilous to justify the Company's concerns about cost cutting and the actions it took, specifically, laying off employees and cutting employees' hours. I also would find and conclude that the Respondent established that Grover and other employees were legitimately from about July 7 through August 5, 2009, being considered for layoff because of the Company's financial conditions. In my view, the record clearly supports these findings and even Grover as bookkeeper came to realize early in her time with the Company that there were serious financial issues afflicting the Company. With the loss of the two major clients in 2009, coupled with what all would concede were very rough economic times in the county, and Michigan in particular during this time frame,⁴⁹ the Respondent in my view established that it could have with justification discharged Grover irrespective of her being engaged in protected economic activity. That said, the question remains did the Respondent actually and honestly discharge her for economic reasons or even because she possibly violated the Company's confidentiality policy.

As I have noted, the Respondent's burden is not only to present a competent defense for its actions against an alleged discriminatee, it must also persuade the judge that its defense is

⁴⁸ Judy and Mark both testified that they conducted an investigation of sorts to determine if Grover had actually made the statements attributed to her by Kountouriotis and determined that she had indeed made the remarks. Keller could not recall being queried by management about the remarks.

⁴⁹ I have taken administrative notice of the national recession ongoing in 2009, and the effects thereof on the State of Michigan. I have also credited the testimony of Judy and Mark regarding the historically low state of the Michigan economy in 2009.

bona fide. In my view, the Respondent has not persuaded me that it discharged Grover for legitimate reasons. I believe that the Respondent's defense(s) is pretextual and that the real reason for its discharge of Grover was motivated by the disclosures made by Kountouriotis at the luncheon meeting on August 14. I do not believe that the Respondent, mainly Judy, had made the decision to lay off Grover either on August 10 or the morning of August 14. It is my belief and finding that the decision to discharge her was made because of the information Judy and Scott received from Kountouriotis at the luncheon meeting on August 14. And as I have stated, while I do not believe Grover made the remarks attributed to her, they, nonetheless, were directly related to her concerted protest of the reduction in hours and her complaints that management—especially Scott—was not properly utilizing company funds to meet the financial crisis the Company was experiencing.

In arriving at this conclusion, I have taken note that Judy testified that she arrived at the decision to lay off Grover on August 10, but later changed her testimony to August 14 in the morning before the luncheon meeting; her credibility suffered in this regard in my view. Then there are Judy's spreadsheets that as late as August 5 included Grover as a potential layoff candidate. However, Grover and Judy both testified that Grover was never told that she was at risk of losing her job and, in fact, Judy seemingly had no actual plans to discharge her, especially with the impending bank audit, and, as indicated in Judy's August 24 email, business was definitely picking up. This flies in the face of the Respondent's claim that Grover was let go for economic reasons.⁵⁰

Then there is the matter of Judy's and Mark's statements to Grover on August 24 as they were discharging her. Judy, it seems, gave token significance to the Company's economic situation in justifying the discharge but, acting on her admitted sense of betrayal, felt compelled to bring up what she had heard at the luncheon meeting. Mark, taking up the cause, then raised the purported breach of the confidentiality policy. Taken together, it seems clear to me that it was the information Judy (and Scott) received at the luncheon meeting which triggered the discharge decision, and not the economic condition of the Company.

I am also persuaded to my conclusion by the testimony of Judy and Mark regarding the "investigation" they conducted following Kountouriotis' remarks to determine whether Grover had made the statements attributed to her. Judy did not say specifically whom she consulted and Mark said that he might have spoken to Keller, who testified that she was not contacted about Grover's statements by anyone from management. In my view, this inadequate investigation further cements in my view that the Respondent's reasons are not bona fide.

I would also note that the Respondent evidently considered Grover to be in breach of its confidentiality policy, mainly by disclosing employee information. However, there was no proof adduced by the Respondent, save Kountouriotis' general state-

⁵⁰ It should be noted that based on Judy's testimony, the spreadsheets she prepared for the management team were utilized solely in their meetings but were not disclosed to any of the nonmanagement employees, most notably Grover.

ment, that would support this charge which Grover adamantly denied.⁵¹ Here again, this aspect of the Respondent's defense seems contrived and, hence, in my view pretextual.

On bottom, I would find and conclude that the Respondent did not meet its burden and, accordingly, the Act was violated by the Respondent in discharging Grover.

Turning to the August 24 email, I would find and conclude that the Respondent violated the Act in disseminating it to the employees. In agreement with the General Counsel, it is clear that this email constituted an interference with the Section 7 rights of the employees. I note that given the totality of the circumstances, these employees could reasonably infer that if they spoke to one another about terms and conditions of their employment without first consulting with management, this would be viewed unfavorably by management. Implicit in this failure could be a serious consequence to include discharge, as was the case with Grover whose discharge was announced in the same email.

I would find and conclude that the Respondent violated Section 8(a)(1) of the Act by disseminating the August 24, 2009 email to its employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Kimberly Grover on August 24, 2009, the Respondent violated Section 8(a)(1) of the Act.

3. By disseminating an email to employees on August 24, 2009, that discouraged employees from talking to each other about wages, hours, and terms and conditions of employment, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Kimberly Grover, I shall recommend that it be ordered to remove from its files any references to Grover's discharge and make her whole for any loss of earnings and other benefits she may have suffered by virtue of the discrimination practiced against her, computed (where and if applicable) on a quarterly basis from the date of the discharge less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I make the following recommended⁵²

⁵¹ For instance, the Respondent adduced no evidence that Grover specifically divulged garnishment, bankruptcy, or other private employee information of any specific employee(s).

⁵² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, The TM Group, Inc., Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for concertedly complaining to its management regarding wages, hours, and working conditions of its employees.

(b) Discouraging employees from talking to each other about wages, hours, and other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Within 14 days from this Order, offer Kimberly Grover full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make Kimberly Grover whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to Kimberly Grover's unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment rec-

ords, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due, if any, under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office in Farmington Hills, Michigan, copies of the attached notice marked "Appendix."⁵³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁵³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."